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No. 918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Appellant

versus

JAMES S. REILY, COLLECTOR OF REVENUE, STATE OF LOUISIANA (Since Succeeded by Robert L. Roland, Who Was Duly Succeeded by Roland Cocreham),

Appellee

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

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LECOMTE, SHREVEPORT, LOUISIANA

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MAY IT PLEASE THE COURT:

The federal question presented by this appeal is indeed substantial! The Louisiana Supreme Court has announced that:

> "• • • there is no extraterritorial exertion of the taxing power involved in including property located in other states in measuring a tax imposed upon a privilege."(1)

(1) La. S.Ct. Opinion, 135 So. 2d 915, 918.

The Louisiana Court holds that the State of Louisiana may tax the privilege enjoyed by a nonresident corporation of owning assets located wholly beyond the State's jurisdiction and which are not used by the taxpayer in furtherance of its business or franchise in Louisiana!

The well-established principles upon which jurisdiction over the intangibles of a non-resident has been based in order to meet the test of constitutionality, i.e., a "commercial domicile" of the nonresident in the taxing state, or a "business situs" or use of the intangibles there, are held to be "immaterial" by the Louisiana Court, which says:

> "* * * it is immaterial whether or not the taxpayer has established a legal or commercial domicile or a business situs of the intangibles in Louisiana; nor is it necessary that the certificates representing the investment in stocks and bonds of the subsidiaries be located or used within Louisiana."(2)

Thus, the Louisiana Supreme Court upholds the constitutionality of the Louisiana statute which levies a tax upon a privilege which was **not** granted by the State of Louisiana but only granted and enjoyed by the taxpayer in the State of Missouri.

This decision is completely contrary to the rulings of this Court in *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77 (1937), *Air-Way Electric Appliance Corp. v. Day*, 266 U.S. 71 (1924), *St. Louis Compress Co. v.*

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(2) La. S.Ct. Opinion, 135 So. 2d 915, 919.

Arkansas, 260 U.S. 346 (1922), and *cf. Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412, 424 (1936).

Counsel for the Collector of Revenue argues that the allocation formula is fair and reasonable and therefore does not infringe upon due process of law.

The primary question which must first be answered is "Does the State of Louisiana have jurisdiction to include the intangibles **as Louisiana assets** of the non-resident taxpayer under any method of allocation (reasonable or otherwise)?" Before counsel for the Collector can discuss the reasonableness of the allocation formula he must first show that the intangibles (which under the formula are classified as Louisiana assets in computing the ratios which measure the tax) are subject to the taxing jurisdiction of the State of Louisiana — by showing that the appellant has established a "commercial domicile" in Louisiana, or that appellant has used *in Louisiana* the stock of its subsidiaries *in its Louisiana business* so as to give the stock a "business situs" in the State of Louisiana.

It is the position of appellant that if it is determined that the formula set out in La. R.S. 47:606B can be applied to the appellant **without first finding jurisdiction** over the intangibles and income allocated, then the formula is *ipso facto* unfair and unreasonable and constitutes a denial of due process for the reason that it is predicated upon property and income over which the State of Louisiana does not and cannot exercise jurisdiction.

Counsel for the Collector makes a futile attempt in his brief to establish a "business situs" of the intangibles.

But the question of whether or not the Appellant has established a "business situs" of the stocks in Louisiana is not an issue in this case! Any such factual issue has been rendered moot by the decision of the Louisiana Supreme Court which holds that such elements of taxing jurisdiction are "immaterial."

The Louisiana Court holds that NO JURISDICTION over the intangibles is necessary for Louisiana to tax, *as a Louisiana privilege*, the privilege of owning the assets that the nonresident enjoys only in the State of Missouri.

Counsel for the Collector erroneously relies upon the case of *National Leather Co. v. Commonwealth of Massachusetts*, 277 U.S. 413, (1928) as being on "all fours" with the instant case. (Appellee's motion p. 9)

An examination of the *National Leather Co.* case shows that the parent company was engaged in the business of purchasing raw hides and selling finished leather. The parent company had no facilities to process or tan the hides, it owned no tanneries — it was not an *operating* tanning company but merely a *holding* company. The subsidiary corporations *through which* the parent operated were, however, engaged in the business of tanning leather. The parent (a Maine corporation) was engaged in the tanning business in the State of Massachusetts *through* its subsidiaries, not *independently* of them. In holding that the stock of the subsidiaries were properly

included as a measure of the Massachusetts franchise tax, this Court found from the evidence that:

> "The business of the National Leather Company — hereinafter called the petitioner — was the purchasing of hides and skins, having them tanned by other companies, and selling the leather **through** the tanners. It operated no tanneries itself. Its business was conducted wholly in Massachusetts; its business offices were located there; and it carried on no active business outside the state. (277 U.S. 420).
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> • • • •
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> "The *entire business* of the petitioner was conducted in this commonwealth, the certificates of stock of the subsidiary corporations actually were kept here, all the business of one and a large part of the business of the other was carried on here, and the petitioner *made use* of the activities of these subsidiary corporations as *essential* parts of its business." (277 U.S. 422) (Emphasis added)

The Kansas City Southern Railway Company, appellant, on the other hand, operates its own railroad as an operating company, separate and apart from and **not through** its subsidiaries. If appellant owned no stock in subsidiary corporations it could continue to operate in Louisiana as it now does separately and apart from its subsidiaries, and as it did for 40 years prior to buying the stock of L&A.

The *National Leather Company* case is not at all applicable to the instant case.

Likewise, *Arkansas Fuel Oil Corporation v. Fontenot*, 225 La. 166, 72 So. 2d 465, in which, as appellee points out at page 9 of his Motion, an appeal to this Court was dismissed in 348 U.S. 804, was merely another situation, like the *National Leather Company* case, *supra*, in which a foreign holding company operated **through** its subsidiaries in Louisiana. There, the Louisiana Supreme Court upheld the constitutionality of Section 606B of the Louisiana Corporation Franchise Tax Statute on the ground that Louisiana's jurisdiction to tax the privilege of owning the intangibles was founded upon "commercial domicile" and "business situs" of the nonresident parent corporation in the State of Louisiana. In *Arkansas Fuel Oil Corporation* the Louisiana Court held"

> "In this case, the policies were carried on and the greater part of the business of the plaintiff corporation conducted at Shreveport by its officers who resided there, under authority of the board of directors *and that is what established for it a 'commercial domicile' and gave it a business situs in Louisiana for the purpose of taxing its intangibles* used in or incidental to its business here." *Arkansas Fuel Oil Corporation v. Fontenot*, 225 La. 166, 181-182, 72 2d 465, 470-471 (1954). (Emphasis added)

No such factual finding by the Louisiana Court is present here. The Court now holds that these well-founded tests for finding jurisdiction may be completely disregarded and that the State of Louisiana may include in its privilege tax computation, **as Louisiana assets and Louisiana income**, intangible property and income there-

from which is admittedly beyond the taxing jurisdiction of the State **and over which Louisiana offers no privilege or protection whatsoever.**

To completely disregard the constitutional safeguards of the Fourteenth Amendment against the taking of one's property without due process of law through the means of extraterritorial taxation presents a substantial federal question of the highest degree!

It is respectfully submitted that Appellee's motion to dismiss this appeal should be overruled and that the appeal should be granted, and the decision of the Louisiana Supreme Court reversed.

Respectfully submitted,

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CERTIFICATE

I, W. Scott Wilkinson, one of the attorneys for Appellant herein, and a member of the bar of the Supreme Court of the United States, do hereby certify that on the ..... day of May, 1962, I served copies of the foregoing Brief In Opposition To Appellee's Motion To Dismiss upon Appellee by mailing copies in a duly addressed envelope, with postage prepaid to Emmett E. Batson, Esq., Room 403, Capitol Annex Building, Baton Rouge, Louisiana, counsel of record for Appellee.

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W. Scott Wilkinson